
OFFICE OF THE VICE PRESIDENT

Information Memorandum

TO: VICE PRESIDENT PENCE

FROM: GREGORY JACOB, COUNSEL TO THE VICE PRESIDENT
Gregory.F.Jacob@ovp.eop.gov
202-881-9069

SUBJECT: ANALYSIS OF PROFESSOR EASTMAN'S PROPOSALS

DATE: JANUARY 5, 2021

Professor Eastman's Proposal

Professor John Eastman is the Henry Salvatori Professor of Law & Community Service at Chapman University Fowler School of Law. Professor Eastman proposes that while presiding over the counting of electoral votes at the joint session of Congress on January 6, the Vice President could:

1. Skip opening and reading the electoral certificates for any state for which an alternate but uncertified slate of electors has been submitted;
2. Save the opening and reading of the electoral certificates for all such states (presently AZ, GA, NM, NV, and PA) until the end of the joint session; and
3. At the end of the joint session, direct that the electoral certificates for these states will not be counted until each State's legislature certifies which of the competing slates of electors for the State is true and correct.

Professor Eastman does not recommend that the Vice President assert that he has the authority unilaterally to decide which of the competing slates of electors should be counted. He stated that in his view, the imprimatur of approval by a State legislature is important to the legitimacy of counting any slate of electors other than the one initially certified by the State's executive.

Legal Analysis

Professor Eastman acknowledges that his proposal violates several provisions of statutory law. Specifically, the Electoral Count Act of 1887 provides that:

- Electoral vote certificates must be "opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A." 3 U.S.C. § 15. It further provides that "[n]o votes or papers from any other State shall be acted upon" until any objections "to the votes or papers from any State shall have been

finally disposed of.” *Id.* Professor Eastman instead proposes that no action be taken, and no disposition made, on the competing certificates for the five to seven States with multiple electoral vote submissions.

- After each electoral vote certificate is read, “the President of the Senate shall call for objections, if any.” 3 U.S.C. § 15. Professor Eastman instead proposes that the Vice President not call for objections with respect to certificates for the five to seven States with multiple electoral vote submissions. This would have the effect of depriving Representatives and Senators of the ability to make objections to the counting of electoral vote certificates, and to debate those objections.
- The Electoral Count Act provides that, whether or not any objections have been made, competing slates of electors must be submitted to the Senate and House for debate and disposition. 3 U.S.C. § 15. Professor Eastman’s proposal would instead refer competing slates of electors to State legislatures for disposition.
- The Electoral Count Act provides that the joint session cannot be dissolved once it begins; that any recess can only be until the next morning (Sunday excepted); and that only five days of such recesses are allowed. 3 U.S.C. § 16. Professor Eastman’s proposal, by contrast, contemplate an extended recess of the joint session to allow State legislatures to investigate the election and to vote on which slate of electors to certify.

Professor Eastman’s proposal is also contradicted by the opinion authored by Republican Supreme Court Justice Joseph Bradley as the deciding vote on the Electoral Commission of 1877. Justice Bradley found that the Vice President cannot decide the validity of electoral votes, and cannot order that investigations into their validity be conducted outside of Congress:

But I think the practice of the Government, as well as the true construction of the Constitution, have settled, that the powers of the President of the Senate are merely ministerial, conferred upon him as a matter of convenience, as being the presiding officer of one of the two bodies which are to meet for the counting of the votes and determining the election. He is not invested with any authority for making any investigation outside of the joint meeting of the two Houses. He cannot send for persons or papers. He is utterly without the means or the power to do anything more than to inspect the documents sent to him; and he cannot inspect them until he opens them in the presence of the two Houses. It would seem to be clear, therefore, that if any examination at all is to be gone into, or any judgment is to be exercised in relation to the votes received, it must be performed and exercised by the two Houses.

Finally, Professor Eastman’s proposal is strongly in tension with the decision handed down yesterday by the District Court for the District of Columbia in the *Wisconsin Voters Alliance* litigation. Civil Action No. 20-3791. The essence of Professor Eastman’s

proposal is that disputes between competing slates of electors should not be referred for decision to the House and the Senate, or determined based on certifications made by State executives. Rather, he contends, they must be referred to and decided by State legislatures. But whereas the former procedures are provided for by the Electoral Count Act, Professor Eastman's proposed course of action has never occurred in the history of the United States. In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court allowed Florida's electoral vote dispute to be resolved through certification by the State executive. And in *Wisconsin Voters Alliance* the court held that "[p]laintiffs' theory that [the Electoral Count Act is] unconstitutional and that the Court should instead require state legislatures themselves to certify every Presidential election lies somewhere between a willful misreading of the Constitution and fantasy." Op. 6.

Had one or more State legislatures in the seven disputed States certified and submitted a competing slate of electors, a strong argument could be made that such a submission would qualify as a certification by a "State authority" sufficient to trigger the Electoral Count Act's provisions for deciding multiple slate disputes. 3 U.S.C. § 15. A reasonable argument might further be made that when resolving a dispute between competing electoral slates, Article II, Section 1 of the Constitution places a firm thumb on the scale on the side of the State legislature. U.S. CONST, Art.II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors..."). Here, however, no State legislature has appointed or certified any alternate slate of electors, and Professor Eastman acknowledges that most Republican legislative majorities in the States have signaled they have no intention of doing so.

Professor Eastman acknowledges that if under present circumstances the Vice President attempted to act in accordance with his proposal, the Vice President would immediately be sued for violating numerous provisions of statutory law. That lawsuit would be filed in the U.S. District Court for the District of Columbia, which just issued the *Wisconsin Voters Alliance* decision rejecting similar arguments that the Electoral Count Act is unconstitutional and that electoral slates must be certified by State legislatures. In light of the unfavorable composition of the D.C. Circuit, it should be assumed the same position would prevail in any appeal.

Professor Eastman makes a colorable argument that the political question doctrine might be applied to bar the courts from deciding any lawsuit concerning the counting of electoral votes. That is unlikely to be the outcome in the D.C. Circuit with its present composition, however, and even if it were, it is unclear that any favorable political solution could follow. Professor Eastman acknowledges that majorities in both the House and Senate would oppose his proposed novel procedure, which would deprive them of their present statutory right to object to and debate electoral votes. He further acknowledges that as of today, no Republican-controlled legislative majority in any disputed States has expressed an intention to designate an alternate slate of electors.

Conclusion

If the Vice President implemented Professor Eastman's proposal, he would likely lose in court. In a best-case scenario in which the courts refused to get involved, the Vice President would likely find himself in an isolated standoff against both houses of Congress, as well as most or all of the applicable State legislatures, with no neutral arbiter available to break the impasse.